APPENDIX A

[Oklahoma Bar Journal pp. 1387-1388]

HARRIS v. STATE
No. F-80-305. May 28, 1982.

CORNISH J. The appellant, Cecil Dejuan Harris, was tried and convicted in Cleveland County District Court, Case No. CRF-79-298, for Rape in the First Degree. The jury set punishment at five (5) years imprisonment.

The State's case-in-chief consisted mainly of the uncorroborated testimony of J.C.W., the appellant's thirteen-year-old stepdaughter. She testified that early one morning during the first week of April, 1979, the appellant had awakened her and had her follow him back to his bedroom. Once there, the appellant and the young girl engaged in sexual intercourse.

In his defense, the appellant offered the testimony of several witnesses tending to show his good character and an alibi that he was out of town on the day the incident occurred. He bolstered this defense with credit card receipts allegedly received on the day in question.

The appellant raises several assignments of error concerning the sufficiency of the evidence, improper prosecutorial comment on his silence, and evidentiary harpoons thrown at both the trial and preliminary hearing. Our disposition of the case requires us to address only the propriety of the prosecutor's comments.

During cross-examination of the appellant at trial, the following exchange occurred:

> Q. You've got all these receipts and you knew that you were out of town every day with Olen. Why didn't you save yourself all this grief and come forward with this evidence and save this whole proceeding?

A. I keep saying it, I didn't understand when this charge was. That is why we pulled receipts for ten months.

* * *

Q. When did you first learn that it was the first week of April that you allegedly committed the act?

A. The Preliminary Hearing.

Q All right. That was in June; is that correct?

A. Yes, sir.

Q. Why haven't you come forward between June and now and saved yourself this ordeal?

A. To keep you from changing the date to a different date.

The prosecutor continued this approach throughout the cross-examination and during closing argument. However, we confine our discussion to the above-quoted remark.

The State does not contest the impropriety of this remark, but argues it was waived by the appellant's failure to object. This argument finds support from our decisions in *Runnels* v. *State*, 562 P.2d 932 (Okl.Cr.1977) and *Boomershine* v. *State*, 634 P.2d 1318 (Okl.Cr.1981).

Although we have not had occasion to address the precise issue, it seems clear to us that any comment or reference to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination. The Fifth Amendment to the United States Constitution allows an accused to remain silent during every stage of a criminal proceeding. *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). He may not be coerced into relinquishing this right of silence by any means, either physical or mental. *Id.* at 448. Nor may any penalty be exacted for an accused's failure to give up his right to remain silent. *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

The prosecutor's cross-examination in the instant case imposed a penalty for the appellant's failure to waive his right of silence. By pointing out the appellant's failure to provide state officials with his alibi evidence prior to trial, the prosecutor urged the jury to draw an advere inference from the appellant's silence. Thus, the State has effectively conveyed a warning to the appellant, as well as to other defendants in criminal trials, that they must present the State with their alibi at the time of their arrest or risk having their failure to do so used against them at trial.

Moreover, the penalty exacted for the appellant's silence is made no more palatable by the fact that the alibi evidence in this case consisted of documents instead of statements by the accused. In *Fisher* v. *United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), the Supreme Court noted that the production of documents by an accused may have "communicative aspects" which give rise to the protections of the Fifth Amendment. This may occur where the production of the documents tacitly concedes their existence or involves their identification by the accused. *Id.* at 410.

Here, production of the appellant's alibi evidence not only required him to identify and to authenticate the documents, but to inform state officials of the connection between the documents and his assertion that he was out of town on the days in question. The documentary evidence was apparently insufficient to establish that fact without some testimony by the appellant. Accordingly, we hold that under the instant circumstances, the prosecutor's inquiry as to the reasons for the appellant's pretrial silence was improper.

In view of the appellant's failure to object to the prosecutor's questions, however, it must still be determined whether the error was waived. We hold that it was not.

In *Runnels* v. *State*, supra, we held that an indirect comment on a defendant's failure to take the stand did

not rise to the level of fundamental error. Similarly, in *Boomershine* v. *State*, supra, we declined to reverse defendant's conviction on the basis of the prosecutor's comment on the defendant's failure to deny the charges while on the stand. Citing *Runnels*, we held that the error was not fundamental and had been waived by the defendant's failure to object. Thus, under these decisions, some conduct by the State in derogation of a defendant's Fifth Amendment rights is subject to being waived, if not objected to.

It is manifest, however, that at some point the prosecutor's conduct so impinges a defendant's right of silence that it may not be waived. We believe the circumstances of the instant case do rise to the point of *fundamental* error. The prosecutor's questions in this case were more than the tangential infringement upon Fifth Amendment rights which occurred in *Runnels and Boomershine*. Rather, they were a direct assault on the appellant's exercise of his right to remain silent. Under these circumstances, we refuse to overlook the error merely because of defense counsel's failure to object. Accordingly, we are compelled to reverse the judgment and sentence and remand for a new trial.

Appeal from District Court, Cleveland County; Alan J. Couch, Dist. Judge.

CECIL DEJUAN HARRIS, appellant, was convicted of Rape in the First Degree in Cleveland County District Court, Case No. CRF-79-298, was sentenced to five (5) years imprisonment, and appeals. REVERSED and REMANDED.

J. Malone Brewer, Oklahoma City, attorney for appellant.

Jan Eric Cartwright, Atty. Gen., Susan Talbot, Asst. Atty. Gen., Chief Criminal Appellate Division, Oklahoma City, attorneys for appellee.

BRETT, P.J., concurs.

BUSSEY, J., dissents.

BUSSEY, J. (Dissenting). From the record it would appear that the defendant welcomed the opportunity to explain why he had not disclosed his alibi to the police concerning his whereabouts on the day of the alleged rape. His explanation was that he did not reveal his presence outside the State (alibi) for fear that the State would change the date of the alleged offense, thus nullifying his defense. This explanation, by implication, placed in issue the good faith of the State. Had such explanation raised a reasonable doubt of the good faith of the prosecution and the guilt of the defendant the tactic of not objecting would have been successful. It is well established that failure to object to evidence of other crimes, hearsay evidence and the failure to object to the introduction of the fruits of an unlawful search and seizure constitutes a waiver to raise these issues on appeal and I see no difference between these errors and the error now complained of. Therefore, I must respectfully dissent. Failure to object to the questions of the prosecutor constituted a waiver of the right to raise this issue on appeal.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

[Filed June 3, 1982]

CECIL DEJUAN HARRIS, Appellant,	)	
v.	)	No. F-80-305
THE STATE OF OKLAHOMA, Appellee.	)	

PETITION FOR REHEARING

COMES NOW, the Attorney General, Jan Eric Cartwright, by and through Assistant Attorney General, Susan Talbot, Chief, Appellate Criminal Division and requests this Court to reconsider its opinion in this case, which was filed May 28, 1982.

GROUNDS FOR PETITION FOR REHEARING

1. Appellant Harris, herein referred to as the defendant, failed to object to the State's examination of the Defendant in regards to his failure to produce prior to trial the credit card receipts allegedly received on the day this crime was committed. This Court has consistently held that the defense cannot "lay behind the log" and allow error to occur but rather defense counsel must make a timely objection to preserve error. This applies to alleged error with regard to the comments on the Defendant's silence, also. See *Boomershine* v. *State*, 634 P.2d 1318 (Okl. Cr. 1981); *Runnels* v. *State*, 562 P.2d 932 (Okl.Cr. 1977), *cert. denied*, 434 U.S. 893, 98 S.Ct. 270, 54 L.Ed.2d 179 (1977). See also *Goforth* v. *State*, 595 P.2d 813 (Okl.Cr. 1979).

In fact, only four (4) days prior to this decision, this Court in *Adams* v. *State*, ___ P.2d ___, 53 OBAJ ___ (Okl. Cr. May 24, 1982) stated:

> In his first and second assignments of error, the Defendant agrees that improper rebuttal and cross-examination occurred when the prosecutor noted the defendant's silence and his failure to proclaim his innocence at the time of his arrest. The complained of questioning took place after the defense had produced a witness, Don Roberts, who claimed that all the contraband was his. Since the record is void of any objection to the interrogatories or of a motion for a new trial, the errors have not been preserved, and thus have been waived. *Boomershine* v. *State*, 634 P.2d 1318 (Okl.Cr. 1981); *Runnels* v. *State*, 562 P.2d 932 (Okl.Cr. 1977), certiorari denied 434 U.S. 893, 98 S.Ct. 270, 54 L.Ed.2d 179."

This conclusion in *Adams* is inconsistent with the present holding. Accordingly, this case should be reconsidered to be in conformity with *Adams* and the cited cases.

2. Further, the defense cured any alleged error by questioning the Defendant on his reason for not coming forward:

> "Q (By Mr. Warren) All right, Mr. Armstrong asked you why you did not come forward. Has this information been provided at the request of an attorney? I'm talking about the receipts and all this business establishing the days.
>
> "A Yes.
>
> "Q In fact, I requested them myself once we found out what week they were talking about.
> "A Yes, sir.
>
> "Q And did you rely solely upon what I told you to do from there on?
>
> "A Yes, sir.
>
> "Q Did I, at any time, mention to you to bring this stuff down to the District Attorney's Office?

"A No, sir.

"Q In fact, I told you, correct me if I am wrong, I told you, let's hang onto the receipts and all this business so that we have got it established because the dates may change if we don't.

"A Yes, sir.

"Q And, in fact, I told you that at the Preliminary Hearing; is that correct?

"A Yes, sir. (Tr. 310, 311)

This Court has repeatedly held that a party may not complain of error which he himself has invited or which he has waived. *Goodrich* v. *State*, 533 P.2d 219 (Okl.Cr. 1976); *Lung* v. *State*, 420 P.2d 158 (Okl.Cr. 1966); *Williams* v. *State*, 373 P.2d 84 (Okl.Cr. 1962).

3. Moreover, the Defendant received a minimum sentence for Rape in the first degree and this impeachment was merely cumulative and not detrimental to the Defendant in light of the similar impeachment of other witnesses and the Defendant's answer which impeached the State's credibility. Therefore, in view of the fact that this statement, even if improperly admitted, did not attribute adversely to the defendant's conviction, any alleged error was harmless. *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See *Goodwin* v. *State*, 625 P.2d 1262, (Okl.Cr. 1981); *Holdge* v. *State*, 586 P.2d 744 (Okl.Cr. 1978); *Youngs* v. *City of Tulsa*, 563 P.2d 156 (Okl.Cr. 1977). Further, the State submits that in view of the testimony presented during the State's case-in-chief, the jury would not have found the State's case significantly less persuasive had this cross-examination been excluded. Thus, if error occurred, it was at most harmless. See *Hall* v. *State*, ___ P.2d ___, 52 O.B.A.J. 2389 (Okl.Cr. October 7, 1981); *White* v. *State*, 607 P.2d 713 (Okl.Cr. 1980).

[APPENDIX]

In *Hall* v. *State*, supra, this Court affirmed a case which contained similar examination, which *was* followed by a proper objection:

> 'The appellant's silence was again referred to in closing argument when the prosecutor state that the arresting officer had '[taken] *a statement' from the appellant at which time appellant had not mentioned that the deceased was carrying a gun.* In *Burroughs* v. *State*, 528 P.2d 714 (Okl.Cr. 1974), we held:
>
> " 'There is a presumption that error of this kind is prejudicial, and in reviewing a case it becomes necessary for this Court to give full consideration to the record and determine whether said presumption has been overcome and that prejudice did not result.
>
> " 'We have thoroughly reviewed the record and find that the presumption of prejudice arising from the comments on the appellant's post *Miranda* silence was cured. The appellant's self defense theory was heavily discredited by the State in the case-in-chief and on rebuttal. Hall's own testimony was that he killed the victim as he sought to flee. Additionally, the improper comments followed testimony that Hall confessed the killing to officers at the scene. He was given Miranda warnings. It is readily apparent that the appellant was silent about his self-defense theory even before the Miranda warnings were given. Therefore, we hold that the remarks in question did not significantly add to the adverse inferences to be drawn.' " [Emphasis added].

As in *Hall*, the questioning in this case did not significantly add to the adverse inferences to be drawn. However, *Hall* is also distinguishable because the prosecutor impeached the defendant's *post Miranda silence* in *Hall*. In this case, it was only *post arrest silence*.

4. In *Fletcher* v. *Weir*, 30 Cr.L. 1093 (3/22/82), the defendant was cross-examined by the prosecutor as to why he had, when arrested, failed to advance an exculpatory explanation to the arresting officers or disclosed the location of the knife he used in self defense. The Court of Appeals for the Sixth Circuit concluded that the defendant was denied due process of the law because the defendant's *post arrest silence* was used for impeachment purposes.

The Supreme Court of the United States held that the distinguishing difference between *Fletcher and Doyle* v. *Ohio*, 426 U.S. 610 (1976) was that the record did not indicate that the defendant received any *Miranda* warnings during the period he remained silent after his arrest. Thus, there was no proof that the government induced silence by implicitly assuring the defendant that his silence would not be used against him and therefore, cross-examination of the defendant's *post arrest silence* did not violate due process.

In the present case, there is no record that the defendant ever received *Miranda* warnings nor proof that the State induced the defendant's silence by affirmative government assurances. In the absence of such evidence, the present cross-examination did not violate due process of law and in light of *Fletcher* this Court's statements in the opinion that "*any* comment or reference to a defendant's pre-trial silence is an improper infringement to the defendant's right against self-incrimination" and that "the Fifth Amendment to the United States Constitution allows an accused the right to remain silent during *every* stage of a criminal proceeding" are not in conformity with the United States Supreme Court's holding in *Fletcher*. Therefore, this petition for rehearing should be considered by this Court in order for this opinion to meet the standards set forth in *Fletcher*.

5. The threshold issue in this case, is not the Fifth Amendment and the defendant's right to silence but rather the issue of credibility. The primary objective of the Criminal Justice system must be the search for the truth and

when the defendant takes the stand in his own behalf this search for the truth should not be limited unnecessarily. The Supreme Court of the United States has not unnecessarily limited this search and neither should this Court. See *Fletcher*, supra; *Anderson* v. *Charles*, 447 U.S. 404 (1980); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). See also *State* v. *Neal*, 604 P.2d 145 (Okl.Cr. 1979), (where this Court stated in dicta that "it is clear that there are no circumstances under which impeachment by reference to a defendant's silence is a constitutional procedure").

In the present case, the prosecutor's comment was designed to refute the defendant's story and not to draw attention to the defendant's right to silence. In fact, any inference to the defendant's silence was so subtle that it failed to draw the defense counsel's attention and therefore should be held to be waived, although such was not constitutional or fundamental error.

CONCLUSION

For the reasons stated, the State, respectfully requests this Honorable Court to grant the State's Motion for Rehearing.

Respectfully submitted,

JAN ERIC CARTWRIGHT
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[Certificate of Mailing omitted]

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

[Filed June 14, 1982]

CECIL DEJUAN HARRIS, Appellant,	)	
v.	)	No. F-80-305
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING AND DIRECTING THE ISSUANCE OF MANDATE

On June 10, 1982, a petition for rehearing was filed in the above styled and numbered cause and this Court having carefully considered the same, finds that the petition should be and is hereby DENIED. The Clerk of this Court is directed to issue the MANDATE FORTHWITH.

Dated this *14th* day of June, 1982.

(s) *Tom Brett*
TOM BRETT, PRESIDING JUDGE

(s) *Tom R. Cornish*
TOM R. CORNISH, JUDGE

(s) *Hez J. Bussey*
HEZ J. BUSSEY, JUDGE, DISSENTS

ATTEST:

(s) *Ross N. Lillard, Jr.*
Clerk